

STATE OF MICHIGAN
COURT OF APPEALS

FLOYD MABINS,

Plaintiff-Appellee,

v

LOUIS EDUARDO BUSTOS, M.D.,

Defendant-Appellant,

and

GRACE HOSPITAL,

Defendant.

UNPUBLISHED

March 9, 2004

No. 239099

Wayne Circuit Court

LC No. 00-000068-NH

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

This medical malpractice case is before us on remand from the Supreme Court as on leave granted. Defendant Bustos appeals the circuit court's order denying his motion for summary disposition under MCR 2.116(C)(10). We affirm.

I

Plaintiff had been in dialysis for several years secondary to hypertensive renal failure before the incidents that gave rise to this suit occurred. Plaintiff had end-stage renal disease, and underwent dialysis regularly under the care of his personal nephrologist, Dr. Robert Hillyer. In order to accomplish dialysis, patients like plaintiff have an AV graft inserted by a general surgeon. In 1996, plaintiff's dialysis graft became blocked and Dr. Hillyer referred plaintiff to defendant, a general surgeon, for its repair. Defendant performed a graft thrombectomy¹ of plaintiff's left arm in April 1996. Defendant performed a second graft thrombectomy in April 1998, after plaintiff's dialysis graft once again became blocked. After the April 1998 thrombectomy, plaintiff complained of pain, swelling and discoloration in the left arm. Plaintiff thereafter was admitted to Grace Hospital on January 20, 1999, with complaints of shortness of

¹ A graft in this context is "a portion of living tissue surgically transplanted from one part of an individual to another." Random House Webster's College Dictionary.

breath. Testing performed during that hospitalization revealed the presence of foreign material in the medial segment of plaintiff's pulmonary right middle lobe. On January 29, 1999, plaintiff underwent a transright femoral pulmonary angiogram and retrieval of foreign body fragments surgery, during which two foreign fragments were removed from his body.² A third foreign body fragment could not be removed due to its location. Plaintiff was released from the hospital on January 31, 1999, but continued to be subject to hospitalizations.

Plaintiff brought suit against defendant and Grace Hospital³ in January 2000, alleging inter alia that defendant failed to perform the graft thrombectomies⁴ in a manner so as not to leave foreign matter behind in plaintiff's body, and failed to ensure that any instruments he used during these procedures were whole and intact after the thrombectomies were performed, thereby subjecting plaintiff to further risks, complications and unnecessary surgeries.

After discovery closed, defense counsel filed a motion for summary disposition on behalf of each defendant in June 2001, ultimately noticing both for hearing on the same date. However, Grace Hospital did not argue its motion at the July 13, 2001 hearing because the parties in the interim agreed to dismiss the hospital.

A

Defendant Bustos' motion for summary disposition argued that there was no genuine issue of material fact regarding proximate cause because plaintiff could not establish that but for defendant's negligence (i.e., the cause in fact/"but for" prong), plaintiff would not have been injured. Defendant argued that there was no genuine issue of fact whether the materials defendant used were radiopaque, since defendant testified he did not use radiopaque materials and plaintiff's expert testified he did not know whether defendant used radiopaque materials. Defendant argued that since there was no genuine issue of material fact that the materials left in

² Plaintiff's complaint alleged that the pertinent surgical reports stated the retrieved foreign body specimens were "synthetic material ranging from 1 to 1.5 cm in length and .1 cm in greatest dimension appearing to be plastic or rubbery string-like material."

³ Grace Hospital was dismissed by stipulation of the parties after the circuit court heard the motion at issue here.

⁴ A thrombectomy is "[t]he surgical removal of a thrombus (a crust of clotted blood), usually from a vein." Attorneys' Dictionary of Medicine. A thrombus is

[a] crust or plug of clotted blood formed in a blood vessel (artery or vein) or in one of the chambers of the heart. It remains attached to the inner surface of the blood vessel or the heart, and may be envisioned as a barnacle attached to an underwater structure. At times, however, part or all of it breaks away from the point of attachment and is carried by the blood stream until it becomes wedged in a narrower vessel, thus obstructing the circulation. A detached thrombus, or a part of it, is an *embolus*. Thrombi usually form on an infected or damages surface, or where the circulation is sluggish." [*Id.*]

plaintiff's body were radiopaque⁵ (visible on x-ray), any opinion that defendant was responsible for the foreign retained body was pure speculation and should not be submitted to a jury. Defendant's motion noted that even plaintiff's treating nephrologist, Dr. Hillyer, testified at deposition that the retained foreign body was likely not from defendant's graft thrombectomy procedure because his [Hillyer's] understanding was that defendant used Fogarty balloon catheters and those catheters are not radiopaque. In support of his motion, defendant attached an affidavit of his radiology expert, Dr. Anthony Munaco, stating that he (Munaco) x-rayed graft thrombectomy materials provided to him by defendant to determine whether they would show up on x-ray, and that they did not. Defendant's motion also noted that plaintiff's expert had never performed a graft thrombectomy such as the one at issue here, and that plaintiff's expert had no idea what the foreign material retrieved from plaintiff's body was, but nonetheless felt at liberty to opine that the retained foreign body originated from defendant's April 1998 thrombectomy.

B

Plaintiff's response to defendant's motion noted that "Plaintiff's expert, Dr. Swerdlow, a Board Certified general surgeon, indicates that one of the theories of malpractice against Dr. Bustos is his failure to recognize that a portion of some materials he used in the surgery broke off and he did nothing to retrieve it at the time of surgery." Plaintiff attached to his response deposition testimony of Dr. Matthys, the radiologist who performed plaintiff's right pulmonary angiogram and retrieved some of the foreign material from plaintiff's body, that one centimeter of the three centimeter foreign body was retrieved and two centimeters still remained in plaintiff's right lung. Dr. Matthys testified that he could only state that the retained body was not a catheter, and that he did not know what it was other than to describe it as a rubbery plastic tubular shaped structure. Plaintiff also attached deposition testimony of Dr. Spanta, the hospital pathologist, who testified that she could not identify what the foreign body was other than "just foreign material."

Plaintiff's response to defendant's motion noted that although Dr. Hillyer did testify as defendant's motion indicated (that his understanding was that defendant did not use radiopaque catheters), Dr. Hillyer was also adamant at deposition that the retained foreign body could not have come from material used in plaintiff's dialysis. Plaintiff argued that, therefore, Dr. Hillyer's testimony "was important toward the determination through deductive reasoning that the retained foreign body must have been left by Dr. Bustos during his graft thrombectomy procedure." Plaintiff noted that his expert, Dr. Swerdlow, concluded that defendant was the only possible source of the foreign material because no one else that had access to plaintiff's veins in the relevant time period used breakable materials.

The circuit court denied defendant's motion by praecipe order, without opinion, following a hearing on July 13, 2001. The parties' stipulation to dismiss Grace Hospital was

⁵ Radiopaque is defined as "Opaque, i.e., not transparent, to x-rays; not permitting x-rays to pass through . . . Radiopaque substances are used to accentuate outlines and details. Their function may be demonstrated by pouring ink into a glass tube, whereby the lumen or caliber of the tube is made clearly visible. Compare with *radiolucent*, *radioparent*, and *radiotransparent*." Attorneys' Dictionary of Medicine.

entered shortly after. Defendant filed an application for leave to appeal the denial of his motion in this Court, which was denied, as was defendant's motion to strike plaintiff's response to his application. Defendant then filed an application for leave in the Supreme Court, which granted immediate consideration, stayed the circuit court proceedings and remanded to this Court as on leave granted.

II

Defendant's first argument is that plaintiff's expert's testimony that the foreign matter must have been left during the April 1998 thrombectomy was without evidentiary basis and should be excluded, because the "undisputed evidence" established that the foreign object removed in January 1999 was radiopaque and "the evidence also establishes that Dr. Bustos did not use materials during the April 1998 surgery that are radiopaque." Defendant contends that without such requisite expert testimony, plaintiff cannot establish either that defendant breached the standard of care or proximately caused plaintiff's injury.

A

This Court reviews de novo the circuit court's denial of summary disposition under MCR 2.116(C)(10). *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). This Court reviews "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion."⁶ *Id.* The documentary evidence must be admissible. MCR 2.116(G)(6). Summary disposition is proper under subsection (C)(10) if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Id.*

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Smith v Globe Life Ins*, 460 Mich 446; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).]

A plaintiff in a medical malpractice case must establish 1) the applicable standard of care, 2) breach of that standard of care, 3) injury, and 4) proximate cause. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Before an expert may offer an opinion, there must be

⁶ We did not consider several documents plaintiff attached to his appeal brief that he did not present to the circuit court. "Appeals to the Court of Appeals are heard on the original record." MCR 7.210(A); see also *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 579-580; 609 NW2d 593 (2000), aff'd *Byrne v State*, 463 Mich 652; 624 NW2d 906 (2001).

evidence to support it. The facts underlying an expert's opinion are not required to be admitted into evidence or to be admissible before or when the opinion is offered; that determination is within the court's discretion. MRE 703 and 705. Regarding causation, the expert must be able to testify that it is definitely probable that the injury would not have occurred but for the negligent act or omission. *Thomas v McPherson Center*, 155 Mich App 700, 704; 400 NW2d 629 (1986). The issue of proximate cause may not be left to speculation or conjecture. *Id.* at 704-705.

B

Defendant principally relied on the following portion of his own deposition testimony:

Q. Did you review the admission of the records [sic] when Mr. Mabins essentially presented himself to the emergency room, he had some chest pain and some other problems, they admitted him, and during the course of trying to figure out what the chest pain originated from, they found evidence of foreign bodies left in his body, retained in his body, did you review that part of the record?

A. Yeah. I saw that, yes.

Q. What do you think that was?

MR. NAUTS [*defendant's counsel*]: I'm sorry, Victor, what do you think the foreign body was?

MR. BOWMAN [*plaintiff's counsel*]: Yes.

THE WITNESS: It's – I think it's a piece of an intravenous catheter.

MR. BOWMAN: A piece of an intravenous catheter.

BY MR. BOWMAN:

Q. When was that foreign body left – when was that retained – foreign body left in his body?

A. There's no way to know.

Q. There's no way to know. Do you use a catheter as part of the procedures that you did for Mr. Mabins?

A. No, that – not a radiopaque intravenous catheter we don't use.

Q. What type of catheter do you use?

A. We use another catheter which is not radiopaque.

Q. Do you think it is impossible that a portion of a catheter which you used during your procedures of Mr. Mabins could have been left in his body?

A. It is impossible.

Q. Why is that impossible?

A. Because we don't leave any segment there. And number two, this is a radiopaque catheter that shows on the x-rays that is described by the radiologist almost like a wire, and the catheter that we use in this procedure does not show up on x-rays.

Q. Then where did this piece of catheter, that you think it is, come from?

A. You know, Mr. Mabins had the intravenous access about 200 times a year when they puncture the graft for his dialysis three times a week. Every time he goes to the emergency room, every time he goes to the hospital, every time he gets a blood test done, all these are possibilities for a foreign body being introduced and left there. So any one of these case – I mean, any one of these times it could be potentially the source of the catheter.

Defendant also attached to his summary disposition motion three pages of the deposition testimony of Dr. Robert Hillyer, plaintiff's treating nephrologist:

Q. Did you give him [plaintiff] any possibilities as to how it [the foreign body] could have gotten there?

A. I listed the procedures and other things that he's had done, but I was not specific as to how it got there.

Q. Could one of the procedures as to how it had gotten there include a graft thrombectomy?

MR. NAUTS [*defendant's counsel*]: Objection to form and foundation.

A. I don't understand how. The Gore-Tex material is not radiodense, it does not show up. The catheters used – my understanding of the catheters used by Dr. Bustos are also not radiodense. So these balloon fogarty catheters are inflated to dilate blood vessels are not radiodense, the type of catheter that he uses.

BY MR. BOWMAN [*plaintiff's counsel*]:

Q. Could it have been something that was left in Mr.

[defendant did not submit the next page of testimony, nor did plaintiff. The next page submitted was 8 pages later.]

* * *

Q. When you indicated that you thought initially that the problem could be secondary to a catheter, were you thinking central line catheter?

A. That was one of the possible catheters, that was one possibility.

Q. What was the other possibility you were thinking?

A. Any sort of IV access, that so-called pick line, which is a long plastic line. Mr. Mabins did not always present to us, but yes, a piece of a catheter or even a wire-guided device that you use to insert catheters was another that we initially considered.

We were told on x-ray it appeared it was a piece of wire, but the path description seems to indicate that it has some metallic properties, but it's not solely wire.

Defendant also submitted the affidavit of its radiology expert, Dr. Anthony Munaco, which stated in its entirety:

1. That I am a board certified radiologist on staff at St. John Hospital in Detroit.
2. That I was provided with the materials provided by Dr. Bustos for performance of a graft thrombectomy.
3. That I placed these materials on my person and took an x-ray to determine definitively whether or not they were radiopaqued.
4. That said x-ray demonstrated that said materials were not radiopaqued.

Dr. Munaco's affidavit is dated June 2001, more than three years after plaintiff's second thrombectomy.

C

We initially observe that defendant submitted nothing that explains what materials Dr. Monaco x-rayed (other than that they were provided by defendant "for performance of a graft thrombectomy), or how Dr. Munaco would be in a position to know that the materials defendant provided him for x-raying (years after plaintiff filed this suit) were in fact the same as the materials defendant used in performing plaintiff's 1998 thrombectomy. In the same vein, defendant's deposition testimony is given in the present tense, and does not explicitly state that at the time of plaintiff's surgery, he did not use a radiopaque catheter, and did not specifically describe all the materials used in plaintiff's surgery. More to the point, however, while defendant opined that the material was a piece of radiopaque intravenous catheter, Dr. Matthys, who performed plaintiff's right pulmonary angiogram and retrieved some of the foreign material, testified that he retrieved one centimeter of the three centimeter foreign body, and that the material was **not a catheter**. The radiopaque character of the catheter used by defendant would seem irrelevant, and certainly not dispositive, if the material retrieved from plaintiff was not a catheter. Further, there was testimony that the substance was almost like a wire, and Dr. Swerdlow testified that Fogarty catheters usually have a metal or otherwise radiopaque guide wire. Dr. Hillyer testified only to the radiopaque-ness of the Fogarty catheter—not a guide wire.

Lastly, Dr. Hillyer testified that in performing dialysis, which was the only other entry into plaintiff's veins, he did not use breakable materials.⁷

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper

⁷ Only a few pages of Dr. Hillyer's deposition testimony were submitted below, and they did not include this testimony. However, Dr. Swerdlow testified at deposition that he reviewed Dr. Hillyer's deposition, and that Dr. Hillyer testified that the foreign material left in plaintiff's body could not have come from his dialysis treatments. MRE 703. Plaintiff's response to defendant's motion for summary disposition also stated that Dr. Hillyer so testified, and Dr. Hillyer's testimony was mentioned at the hearing on defendant's motion as well.